No. 15,625

United States
COURT OF APPEALS
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

GIUSTINA BROS. LUMBER CO.,
Respondent.

BRIEF OF RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

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PRELIMINARY STATEMENT

Respondent fully appreciates the heavy burden assumed by it in attacking the validity of an order of the National Labor Relations Board. The duty of satisfying the statutory obligation that the record as a whole does not support the order is weighty enough, but that burden is made more onerous by the practice of the Trial Examiner in composing a report in which findings are drawn from negatives and omissions; conclusions flow

from comparisons and unanswered questions. Time and again "findings" are not based on identified portions of the record. Refuge is sought in the all encompassing phrase—"from the entire record." This obscure and masked method of drafting a report, makes almost impossible the task of citing specific portions of the record to refute his "findings."

In this particular proceeding most of the substantial evidence is stipulated by the parties or is written. We are not confronted with the usual case where weight is to be given to findings because the Trial Examiner had the benefit of observing the witnesses on the stand, their demeanors and attitudes, which ordinarily would help him to find the true facts from conflicting testimony. Under these circumstances we are not concerned with credibility of witnesses or conflicting testimony.

The parties stipulated the record (G.C. Ex. 2, Tr. 16-51): the right to adduce testimony "concerning any further facts material to the issue" (Tr. 36, para. XX). This stipulation is binding as to the matters covered by it, *Shopmen's Union v. N.L.R.B.*, 219 F.(2d) 874 (C.A. 6, 1955); *H. Hackfeld & Company Limited v. U.S.*, 197 U.S. 442 (1905); *Morey, Adx. v. Redifer,* 204 Ore. 194, 282 P.(2d) 1062; *Crouch v. Central Labor Council,* 134 Ore. 612, 293 P. 729.

Respondent, Giustina Bros. Lumber Co., has operated a sawmill in Eugene, or its vinicity for a good many years. To supply logs to the sawmill it has conducted logging operations in the Eugene, Oregon area. Since at least 1938 its employes in these operations have

been represented by Locals of the Lumber and Sawmill Workers, A.F. of L. In all of that period of time and prior to the 1954 strike Respondent had had but one dispute with the Unions which led to a work stoppage. That was an unauthorized "quickie" strike in 1951. The relationship over the years has been good. The woods employes have been represented by Local 2574 and still were at the time of the hearing (Tr. 285). This history of harmonious relations was not challenged.

Since the material facts are stipulated and they are brief, we see no need to repeat them here. Those pertinent to the issues as we see them will be referred to in the discussion of each issue. A general statement will suffice as a background to a statement of the issue. June 21, 1954 an industry-wide strike occured in the lumber and plywood industries in Oregon and Washington. Respondent was a party to that strike. The strike continued until after August 26, 1954.

A back to work movement started among the employes of Respondent about July 24th. This culminated in a meeting of about 22 employes of Respondent. Officers of Respondent were invited to the meeting. These men decided to go back to work. Operations of Respondent's sawmill were then resumed. August 5, Respondent wrote a letter to its employes advising that operations had been resumed. On August 26 a formula for the settlement of the strike was worked out under the auspices of the Governors of Oregon and Washington. On the basis of this formula the industry strike was settled although it continued at Respondent's sawmill until January 19, 1955.

August 31, 1954 the Governors' formula was proposed to Respondent. Respondent rejected it.

Prior thereto and on August 25, Winey and associates, employes of Respondent, filed a decertification petition.

The Trial Examiner held that the strike, while initially economic, was converted into an unfair practice strike and was prolonged by Respondent.

SUMMARY OF ARGUMENT

Respondent's participation in the meeting of July 28th did not amount to an unfair practice. Respondent made no threats or promises. Its interest, admittedly selfish, to resume operations was a legal interest it was entitled to foster. Respondent did not bargain with employes or interfere with their rights.

The letter of August 5th was not found to be an unfair letter. Since the conduct of Respondent prior to August 5th did not violate the Act, the Examiner's condemnation of the letter as part of a plan of interference is baseless.

Respondent did not unlawfully refuse to bargain with the agent representing its employes at the meeting of August 31st. Local 2611 was not bargaining in good faith because (1) it had permanently transferred authority to bargain over wages to the District Council; (2) the Council representatives were not prepared to bargain at the meeting; (3) Local 2611 no longer represented Respondent's employes; (4) the pending decerti-

fication petition relieved Respondent of any obligation to bargain.

If Respondent did commit an unfair labor practice before August 31, that act did not prolong the strike to August 31. All strikers had been replaced by August 31st.

Since Local 2611 did not comply with the requirements of Section 8(d), the employes forfeited employment rights when the strike occurred, so absolving Respondent of the charges. Having struck illegally, the Board improperly rewarded the strikers with its order of reinstatement with back pay.

ARGUMENT

The Meeting of July 28th

We have read, reread and read again the part of the Intermediate Report dealing with the meeting of July 28th. We confess our inability to understand the reasoning of the Trial Examiner or the bases for his conclusions. We submit that the Report itself contains the elements which destroy it.

The Trial Examiner started his remarks about the July 28th meeting with this statement (Tr. 154):

> "In the light of the entire record, it is true, there would seem to be no justification for a conclusion that the Respondent instigated the back-to-work movement among its employees, or that any of its management representatives sponsored or promoted the assembly which preceded its resumption of plant operations."

Later he concluded (Tr. 159, 160):

> "As the General Counsel has put it, the assembly was not accidental; all of the circumstances compel the inference that it had been prearranged by interested employees and the Respondent's representatives."

Again he reports (Tr. 154):

> "(The contention of Respondent's counsel that the firm's management representatives were invited to the assembly, initially, after it had started, must be rejected as contrary to the record.)"

But the Stipulation of the Record provides (Tr. 21):

> "One of said employees suggested that they move the meeting to the parking lot of Respondent. This group of said employees then went to the parking lot of Respondent. When they reached the lot they found that the shop was open. The shop had been used in the past for employee meetings. *The group then went into the shop. Officers of Respondent,* President Nat Giustina, Ehrman Giustina, and Sam E. Hughes, *were then invited* to the meeting and attended part of it. No objection was raised by Respondent to holding the meeting on the property of Respondent." (Emphasis added.)

Hughes testified he was called by Robertson sometime after 9:30 P.M. and probably close to 10:00 or 10:15 P.M. He was prepared to go to bed (Tr. 312a). The Trial Examiner found that employes assembled between 9:30 and 10:15 P.M. And, he found that Hughes, who was preparing to go to bed, was on the premises near the shop (Tr. 121).

The parties stipulated "The shop had been used in the past for employee meetings (Tr. 21)." In the face of

this stipulation, the Examiner finds that the use of the shop was a departure from previous practice (Tr. 155).

These contradictions in the Intermediate Report, the refusal of the Trial Examiner to follow the Stipulation, justify, if they do not require, careful consideration of the Report and Record.

Concluding his Report upon this meeting, the Trial Examiner said (Tr. 162):

> "The available evidence establishes, however, that the employees present were reminded of their 'individual' right to abandon the strike and return to work; that they were urged, upon several grounds, to 'think' about their own welfare; and that, upon direct inquiry, they were informed of the wages, hours, and working conditions which would govern their employment. In their totality, I find, the remarks of Hughes and President Giustina amounted to a direct appeal to the employees to accept the Respondent's final offer—the maintenance of the status quo with respect to all significant aspects of the employment relationship—which the Union's designated representatives had rejected. This was tantamount to direct dealing with the employees on the wage issue then in dispute."

The principles of law by which meetings of this type are to be judged are well established. They are well stated in *N.L.R.B. v. Bradley Washfountain Co.,* 192 F.(2d) 144, as follows:

> "From 1937 to 1948 Union and Respondent enjoyed unbroken collective bargaining relations under a union shop contract. In 1948 negotiations over Union proposals were unsuccessful. A strike was called. After the strike started, Respondent wrote a letter to the employes indicating it desired to resume operations. The letters were ineffectual. Respondent's officials called on employes asking if they desired to

return to work. A meeting was arranged with employes. Respondent provided the place. A second meeting was held. Respondent suggested the men proceed to the Union Hall and seek a vote. Respondent then wrote a letter that it would resume operations and did so. A majority of the working employees filed a decertification petition. Respondent thereafter refused to recognize the Union."

These activities were held by the Board to convert the strike into an unfair labor practice strike. Said the Court:

"The cases involving the propriety of an employer's solicitation of individual employees, seem to fall into at least three classes. One involves the situation arising prior to or during the formation of the union or during a conflict between two or more unions for the right to represent the employees. The second arises when employees are on strike caused by prior unfair labor practices of the employer. The third is the situation in the present case, namely, where the employees are out on an economic strike.

"In the first situation it seems clear that the Board and the courts will examine closely the employer's conduct in order to ascertain whether interference or coercion is present.

"Close scrutiny is necessary, for in such situations any employer activity which tends in the least to interfere with or coerce employees in the exercise of their rights is improper.

"The second class also represents situations where the Board and courts keep a jealous eye on the employer's activities. See N.L.R.B. v. Montgomery Ward & Co., 133 F.2d 676 (12 LRRM 508) (CA-9); M. H. Ritzwoller v. N.L.R.B., 114 F.2d 432 (6 LRRM 894) (CA-7). This is necessary, for if unfair labor practices of the employer are the cause of the strike, he must not employ improper

means to break the strike before the wrong is remedied.

"In the third case the Board and Courts face another problem. Communications with employees by an employer are protected under the First Amendment of the Constitution so long as such communications contain no threat of reprisal or promise of benefit. Thomas v. Collins, 323 U.S. 516 (15 LRRM 777); NLRB v. Virginia Electric & Power Co., 314 US 469 (9 LRRM 405); NLRB v. Penokee Veneer Co., et al, 168 F.2d 868 (22 LRRM 2254) (CA-7). The mandate of the statute is that the employer shall not interfere with or coerce the employees in the exercise of their right to organize and bargain collectively. However, absent a showing of interference or coercion, or a threat of reprisal or promise of benefit, in such situation, the employer is free to say to his employees that he wishes to carry on production and, that, if the employees desire so to do, they may return to work.

"This classification results in no subtle distinction clouding further the field of labor relations. We conceive it to be realistic based on the recognition of two important considerations. The first is that the employer has the economic right to continue operation of his plant. He may go anywhere for his labor supply, so long as he is guilty of no misconduct in his attempt. The second consideration, and perhaps the more important, lies in the fact that employees, striking for economic reasons, may be replaced and, if, at the conclusion of the strike, positions of employment are no longer available the employer is under no duty to rehire them.

"In situations such as the one before us, we think the employer may communicate directly to his striking employees the working conditions he is willing to extend to them; and that, if in the exercise of free choice the employees return to work, no charge of misconduct may properly be levied against him. If the communications are fair in their

description of the situation and they do not offer the return employees greater benefits then will be extended to those remaining on strike, they do not support a finding of unfair labor practices. NLRB v. Penokee Veneer Co., 168 F.2d 868 (22 LRRM 2254) (CA7).

"Turning then to the record in the instant case, viewing it as a whole, it appears that, during an economic strike, the letters sent to the employees and the meetings held with them were designed to accomplish but one thing; to ascertain just how many employees desired to return to work under the then existing pay scale, should respondent reopen its plant. There were no promises of other than normal benefit for those who returned, or threats or reprisal, if they failed to return. The record shows further that respondent requested that the employees attending the final meeting seek a vote of the Union to determine if the strike should be continued. This was rejected by the Union representative. The substantial evidence, viewing the record as a whole, points to only one conclusion, that the communications with the employees were made in good faith, did not interfere with, or coerce the employees in the exercise of their rights to organize and bargain collectively under Section 7 of the Act and were not of such a nature as to support a charge of unfair labor practices under Section 8 (a)(1) of the Act. Therefore, the conclusion of the Trial Examiner that the strike economic in origin, became an unfair labor practice strike because of these later activities, was unsupported by the record. The strike, in its inception, as he found, was economic in nature, it continued as such, until its termination on April 13, 1949."

The Examiner proscribed Respondent because it was in sympathy with the back to work movement (Tr. 159); it permitted the use of the shop by the employes (Tr. 155-159), it welcomed the back to work move-

ment (Tr. 154). Assuming these factors to be present, they do not constitute an unfair labor practice. In *Bradley Washfountain Co., supra,* the employer not only wrote letters to the strikers, its officials paid personal calls on the individual strikers, arranged and attended meetings, providing the place for the meeting.

Solicitation of strikers to return to work is not unfair, *Celanese Corporation of America,* 95 NLRB 664; the statement to strikers in connection with such solicitation that seniority would be changed did not convert an economic strike into an unfair labor practice strike, *Blackstone Mills Inc.,* 109 NLRB 772; using an employe to attempt to convince the others not to strike is not wrongful action by an employer, *NLRB v. Reynolds & Manley Lumber Co.,* 212 F.(2d) 155 (CA 5th, 1954).

The Trial Examiner condemned Respondent because the strikers were "reminded" of their right to abandon the strike; they were "urged" to "think" about their own welfare; they were informed of the wages, hours and working conditions which would govern their employment (Tr. 162). This the Examiner concluded was a direct appeal to the employes to accept the Respondent's "final" offer.

First, there is no evidence that Respondent ever made a "final" offer. Further, the Record does not support the Examiner's conclusion. The facts in regard to this issue were stipulated. They are (Tr. 29):

> "Bloom: If we go back now, how about the pay? Would we get the same rate of pay we're getting before the strike?

> Nat Giustina: Now, just a word here about pay. The wages, hours and working conditions in effect at the start of the strike would be maintained."

By no manner of reasoning can this simple statement of fact be twisted into a proposal to those present to accept Respondent's "final offer." At most there were twenty-two people present. They could not accept the offer. Respondent did not state to the men that it had made any offer. Howden testified that he asked Respondent for an offer and was answered "There will be no offer (Tr. 271)." While Giustina, with reference to the same conversation, testified (Tr. 289):

> "I'll make you an offer. Wages and working conditions as they were when you went on strike." They said, "Well, we can't talk to you by authority of the District Council."

It is inescapable that the crew had no knowledge of any offer of Respondent, if in fact one was made. At the July 28th meeting Respondent did not refer to any offer, nor did anyone else. Respondent, answering a pertinent inquiry, stated the fact. What else could have been said? A statement of an increase or decrease in wages would have been unlawful as a promise of benefit or a threat of discriminatory action. A statement of the fact cannot be twisted into a proposal, a promise or a threat.

The Letter of August 5, 1954

The Trial Examiner did not find that the letter of August 5, 1954 was unlawful interference. The letter reads (Tr. 8, 9):

> "Operations at our plant in Eugene were re-

sumed July 29, 1954. Some of you have not returned to work. We plan to continue our Eugene operations. If you have not returned to work by Monday, August 9, 1954 to start the regular day shift, it will be considered that you have severed your employment and we will look to others to fill the jobs.

Criticizing the letter, the Examiner explained:

"In the light of the situation created by the Respondent's antecedent encouragement of the back-to-work movement, and its direct exposition of the terms and conditions under which operations would resume, the letter in question necessarily involved something more than a written statement of the firm's intention to exercise a lawful right under the statute." (Tr. 163, 164)

"Under such circumstances, established decisional doctrines would seem to compel the conclusion that the Respondent had lost its right to treat the Union employees as economic strikers, and to notify them that, upon their failure to resume work by a definite date, the firm would exercise its statutory right to replace them." (Tr. 164)

"Employees in receipt of such a letter, I find, could reasonably be expected to assess its significance in the light of the Respondent's antecedent effort to encourage a back-to-work movement, and to deal directly with prospective returnees. When so considered, its essential significance as solicitation with respect to the abandonment of the strike, coupled with a threat to the employment status of those oblivious to its implicit appeal, would seem to be patent." (Tr. 165, 166)

It is patent that the Trial Examiner did not consider that the letter alone was an unfair practice. His conclusion is predicated upon the prior one that Respondent had negotiated with the strikers and coerced them. We

have shown the errors of the Trial Examiner that destroy that conclusion. With the fall of this basic premise of the Trial Examiner, his conclusions as to the letter also must collapse.

He found further that the statement that those who did not return would be replaced constituted coercion because Respondent had committed an unfair labor practice. We have shown the fallacy inherent in this conclusion.

Considering the letter, the Trial Examiner emphasized that no action taken by Respondent after the letter was written can be described as inconsistent with his construction of the letter as a termination notice (Tr. 166). The record shows that the parties stipulated:

> "Thereafter (after the letter of August 5), more employes who had been on strike returned to work and with new employes have continued Respondent's operations (Tr. 34)."

Compare also the references of the Trial Examiner showing clearly that "strike breakers" returned to work and thereafter were discharged for failure to report to work after they had returned to work (Tr. 188).

This topic is considered further, *infra,* pp. 36-38.

The Charge of Refusal to Bargain

We consider now the status of the Union with respect to the charge that Respondent failed to bargain with it after the strike started. It is Respondent's position that collective bargaining is the mutual obligation of the employer and the representative of the employes

(Section 8(d); that when either the employer or the Union is not negotiating in good faith, the other party to the bargaining cannot be convicted of not bargaining in good faith for then there is no mutual obligation. The duty to bargain, imposed upon the employer, is to bargain with the representative of the employes. Local Union No. 2611 was the recognized bargaining agent (Tr. 38).

We submit further that when either party to negotiations enters upon negotiations with a closed mind, a refusal to consider the discussion or counterproposals of the other, there is a refusal to negotiate in good faith. Also, when an employer or a bargaining agent vests in another the power to agree or to disagree, that party cannot meet the statutory requirement to bargain mutually in good faith.

The record shows that the Council (not the Local Union) opened on wages (Tr. 41, App. B, Tr. 268), "in 1948, the District Council was given permanent authority to act on general wages raises for local unions (Tr. 269) * * *. We have the right to negotiate on everything but wages (Tr. 270)."

The Trial Examiner (Tr. 184-186) characteristically attempted to evade the full force of these facts. He pointed out that the Council did not administer contracts; did not negotiate contracts and did not claim to be the bargaining agent. These comments are beside the point. The point is that the bargaining agent, Local No. 2611, did not bargain. Howden, as Council representative, asked Respondent to make an offer (Tr. 271); the

Council had the right of negotiation (Tr. 272, 273); the Council received the copies of the Governors' proposal (Tr. 273). The Local Union was completely ignored by the Council. The Trial Examiner found some comfort in the fact that Howden, the business agent, was also a member of the Council (Tr. 185). But Howden acted as Council representative, not as a representative of the Local (Tr. 271).

Even when the Governors' proposal was available, the Local did not submit it to Respondent. The proposal became the only basis for settlement by decision of the Northwest Council and the District Council (Tr. 273, 276).

The facts are that at the meeting of August 31st, relied upon by the Trial Examiner to support a conclusion of a failure to bargain, the bargaining agent, Local No. 2611, was not present; it had transferred permanently its authority to the District Council; the District Council would settle only on the basis of the Governors' proposal (Tr. 276). Respondent, under these circumstances, was under no obligation to bargain.

Local 2611 had represented the employes of Respondent for collective bargaining purposes for many years. Prior to the 1954 negotiations, Local 2611 transferred its bargaining rights over wage adjustments to the Willamette Valley District Council of Lumber & Sawmill Workers. This transfer was so absolute that Respondent was threatened with strike action if it attempted to negotiate with the Local Union—the legal bargaining agent.

Superimposed upon the Willamette Valley District Council was the Northwestern Council of Lumber and Sawmill Workers. The Northwestern Council was composed of representatives of the various District Councils. When the Governors' Fact Finding Committee formula was proposed as a method to settle the strike, the Northwestern Council adopted it as the basis for settlement.

Other factors must be given consideration in evaluating Respondent's conduct at the August 31st meeting. Prior to this meeting, Winey and associates, a group of Respondent's employes, had filed a petition to the Board for decertification of Local 2611 as the bargaining agent for Respondent's employes (G.C. Ex. 3, p. 52, p. 135). At this time Respondent's sawmill was operating with a complement of a normal crew. These men were going to work through the picket line, and, by so doing, vividly expressed their repudiation of the bargaining agent (Tr. 304, 312).

Article VIII of the Working Agreement (Tr. 38) provided that wages shall continue subject to the right of either party to request a general wage change. Article IX (Tr. 38, 39) reads:

> "The Company and the Union agree that the grievance procedures specified hereinabove in Article II are adequate to provide a fair and final determination of all grievances arising under the terms of this agreement.
>
> "Therefore, during the life of this agreement no strike shall be caused or sanctioned by the Union or any of its members and no lockouts shall be entered upon by the Company until every peaceable method of settlement of the difficulties involved, as provided

> hereinbefore in Article II, shall have been tried and the parties hereto have been unable to resolve their differences."

The Article then details additional steps to be taken by the parties before a strike or lockout may be called without the strike or lockout being a breach of the contract. These steps were not taken.

It is against this background that Respondent's actions at the August 31st meeting must be weighed. At that meeting Respondent told the representatives of the District Council (not of Local 2611) that the Fact Finding Formula did not apply to it (Tr. 35). This inapplicability is obvious. Point 1. of the Formula (Tr. 48) is "Returning all crews to work as soon as practical." Respondent could not meet this requirement. Prior to that time, August 26, 1954, it had a normal crew working (Tr. 304, 312).

Respondent said further that the decertification petition threw doubt upon the status of the bargaining agent, and until the question of representation was resolved, Respondent did not feel it proper to negotiate (Tr. 35). The Trial Examiner concluded that Respondent was charged with knowledge of the law that the decertification petition was not timely as the contract with Local 2611 was a bar to the representation question (Tr. 168-172).

The Trial Examiner relied upon *Penn Broadcasting Company,* 93 NLRB 1104 (Tr. 168). That case holds that an employer may continue to bargain with the Union where the rival claim of recognition is specious

and untenable. The Board in the *Penn Broadcasting* case did not hold it would have been an unfair practice if the employer had refused to bargain until the question of representation was settled. That precise point was considered by the Board in *Union Carbide & Carbon Corp.*, 105 NLRB 57, 32 LRRM 1277. In this cited case the Board clearly held contrary to the Trial Examiner's contention, saying:

> "We agree with the Respondent that the filing of the petition raised a *prima facie* question concerning representation which, under the "Midwest Piping" doctrine, precluded it from bargaining further with the incumbent union during the pendency of the petition. The Board has held that the mere filing of a petition by a rival union seeking to dislodge an incumbent union, such as that here, does not itself require an employer to refrain from continuing to recognize the incumbent statutory representative.
>
> "But we also pointed out that, in continuing the established relationship with an incumbent union, an employer runs the risk of an unfair labor practice finding if the Board later determines that the petition raised a 'real question concerning representation'. It would therefore be manifestly unfair to *require* an employer who has engaged in no antecedent unfair labor practice, to bargain at his peril during the pendency of a timely petition.
>
> "We are convinced by the record as a whole that during the pendency of the petition and after its dismissal by the Board there was a reasonable basis for the Respondent to have believed that the Union no longer represented a majority of the employees. Thus, the Union's certification was about 5 years old. It had just terminated an unsuccessful strike which resulted in the replacement of a large number of Union adherents. The Independent had made

> a rival claim of representation upon the Respondent, and implemented it by filing a representation petition. As stated above, the Independent's petition was administratively dismissed by the Board, not because its claim was unfounded, but because of the pendency of certain charges filed by the Union which have been found herein to be without merit."

William Penn Broadcasting Co., 93 NLRB 1104, relied upon by the Trial Examiner was held to be inapplicable under these circumstances.

This point was considered by the Court of Appeals for the Seventh Circuit in a case remarkably similar to the instant one—*N.L.R.B. v. Bradley Washfountain Co.*, 192 F.(2d) 144, 29 LRRM 2064. It there appeared that while a strike was still under way, a decertification petition was filed by a group of employes who were working behind the picket line. In that case, as here, the Board decline to act on the petition because unfair charges were pending. Thereafter the employer refused to recognize the Union. Said the Court:

> "An employer may not refuse to recognize a Union that has lost its majority status if the cause of the loss was unfair labor practice by the employer, or if the loss occurred during a period when the employer was engaged in unfair labor practices. International Association of Machinists v. N.L.R.B., 311 US 72, (7 LRRM 282); Franks Bros. v. N.L. R.B., 321 US 702, (14 LRRM 591). However, neither of these rules is applicable here. The Board has held that an employer commits an unfair labor practice when he recognizes a union under circumstances where a question of representation has been raised. Midwest Piping and Supply Co., 63 NLRB 1060 (17 LRRM 40); International Harvester Co., 87 NLRB 1101 (25 LRRM 1195). Certainly such a

question was raised here. It would appear then, in the normal course of procedure, that it became incumbent on the Union to petition the Board for a determination of the question of representation. This it did not do; yet it is undisputed that a majority of the members had of their own accord, petitioned for decertification. To say that an employer in such a situation, with amicable relations with the Union for 10 years, learning that a majority of the members had voluntarily disclaimed a desire to be connected with it longer, still owed a duty to recognize it is to rob the act of all realities and practicalities. Thus in Pacific Gamble Robinson Co. v. N.L.R.B., 186 F.(2d) 106 (27 LRRM 2206) (CA-6), the court said:

> " 'The employer had recognized and bargained with the union and both the trial examiner and the Board found that up to August 30 no unfair labor practice existed. The union's agent, Alsten, testified that after the strike occurred he made no attempt to contact the employer. The employer is entitled to have its conduct considered in the light of this history with its complete absence of hostility to the union. National Labor Relations Board v. Penokee Veneer Co., 7 Cir. 168 F(2d) 868, 4 ALR 2d 1350 (22 LRRM 2254), National Labor Relations Board v. Algoma Plywood and Veneer Co., 7 Cir. 121 F(2d) 602 (8 LRRM 777); National Labor Relations Board v. Kingston, 6 Cir., 172 F(2d) 771, 774 (23 LRRM 2387).' "

Enforcement was denied.

Even in the instant case the holding of the Board was contrary to that of the Trial Examiner. Upon appeal from the ruling of the Regional Director dismissing the Winey petition, the Board held that the pendency of an unfair labor practice charge barred the election. Even though this ruling was presented to the Trial Examiner

(G.C. Ex. 2, App. 1, Tr. 48), he chose to ignore it and based his decision upon a principle held by the Board to be inapposite.

The Letter Terminating Agreement

The Trial Examiner seized Respondent's letter to Local 2611 terminating the agreement (G.C. Ex. 2, App. K, Tr. 50), as added proof of Respondent's "unlawful" conduct. He pointed out (1) that Article XIII of the Agreement (Tr. 40), did not provide for such notice; (2) that the letter "could be expected at the very least to persuade them, whether strikers or strike breakers, that the Union had lost in influence as their bargaining agent. Under all the circumstances, therefore, the dispatch of the letter must also be characterized as a refusal to bargain in good faith * * * and as interference, restraint and coercion directed to the Respondent's employees" (Tr. 173).

This letter was sent to Local Union No. 2611 on September 2, 1954, after the meeting of August 31st, during which Respondent raised the question of representation.

To answer the points made by the Trial Examiner, the letter does fall within the terms of Article XIII of the Agreement. That Article provides that notice of termination must be given at least 75 days before April 1st. The letter of September 2nd complies literally with this requirement. It was given at least 75 days before April 1st.

The notice of termination cannot be equated with a

refusal to bargain. The Act, itself, defining Collective Bargaining, Section 8(d), recognizes that a notice to terminate is not a refusal to bargain. Since Respondent lawfully could refuse to bargain until the representation question was settled, the letter could not destroy the legality of that position, even if it be construed as the Trial Examiner would have it.

Once more the Trial Examiner reached to find that the Respondent, by means of the letter, impaired the Union's position as bargaining agent; attempted to persuade the strikers and strike breakers that the Union had lost its influence; and interfered with, restrained and coerced its employes (Tr. 173). Had Respondent broadcast this letter to the employes, the Trial Examiner's conclusion would be worthy of consideration. But the letter was sent to the Local Union. There is no evidence that Respondent publicized the letter; there is no evidence that the letter ever came to the attention of anyone. The letter could have had no influence upon the "strikers or strike breakers;" it could not have interfered with, coerced or restrained them. They never saw it.

Actually the conclusions of the Examiner with respect to the letter serve only to emphasize his purpose to convict Respondent one way or another.

There is an additional answer to the questions asked by the Trial Examiner,—"why did Respondent send the letter?" We have pointed out above that the labor agreement contained a no-strike clause. A strike in violation of the terms of that clause is a breach of a material term

of the contract. When such a breach occurred, Respondent had a choice of remedies—rescission or an action for damages. The letter was respondent's election to rescind. *Boeing Airplane Co. v. Association of Machinists,* 91 F.S. 596 (DCWD Wash. 1950), approved by this Court, 188 F.(2d) 356; certiorari denied 342 U.S. 821.

The Trial Examiner did not meet this point (Tr. 177-182). After several pages of conjectures and evasiveness, he concluded (Tr. 181):

> "I would find it by no means clear, in short, that the Respondent was privileged to treat a strike incidental to general wage negotiations as a material breach of the agreement's strike and lockout clause."

The Trial Examiner has apparently confused some rule relating to Burden of Proof with the construction of this contract. The contract is clear—there shall be no strikes or lockouts until the procedures agreed upon have been followed. Wages are covered by the contract. There is no limit placed upon the number of times either party could request a wage adjustment (Article VIII, Tr. 38). The no strike clause served a worthwhile purpose under these circumstances.

The Trial Examiner suggested that a strike over a wage demand would not breach this clause, while a strike over a grievance, however petty, would be a material breach of the clause. The Trial Examiner overlooked the fact that the impact of a strike upon Respondent is the same, regardless of the cause of the strike. The purpose of the clause is to prevent any strike. The substance of materiality is found in the purpose of

the clause to prevent strikes, not the reason for the strike.

As a matter of fact, the clause adopted sensible mature methods to avoid work stoppages. A cooling off period was included. In addition, the requirements of written statements of position and notice of action would force the parties to carefully reconsider their respective positions. Such reconsideration and written statements of position would tend to eliminate personal or emotional reasons for a work stoppage.

Economic or Unfair Practice Strike

These are the undisputed facts.

The strike started as an economic strike—one for a wage increase. Before the strike Respondent's mill operated the usual day shift, and ran a temporary second shift. The life of the second shift depended upon favorable market conditions and an adequate supply of logs. After the strike had continued a while, Respondent abandoned the second shift because logs could not be accumulated to maintain it. There is no charge or finding that the discontinuance of this shift was an unfair practice.

The Trial Examiner concluded that the strike was converted into an unfair labor practice strike by "unfair practices" of Respondent which prolonged it. The Examiner did not find the specific date after which the strike would be considered an unfair practice strike. He concluded (Tr. 173, 174, 177):

"In the light of the available evidence there can

be no doubt that each element in the Respondent's course of action as detailed above, and its entire course of conduct, involved the unfair labor practices found and served, necessarily, to convert the Union's antecedent economic strike into an unfair labor practice strike."

"Specifically, it may be noted that the Respondent's employees still on strike after August 5, 1954, voted overwhelmingly—at a regularly called Union meeting—to return to work as a group. In effect, this was a vote to extend or continue the strike, despite the apparent success of the back-to-work movement and the resumption of operations at the Respondent's plant. It should be noted, also, that the Respondent's operation was the only one previously under contract with a constituent local of the District Council at which the so-called 'industry-wide' strike remained current after the publication of the Governors' Proposal with respect to a strike settlement."

"Upon the entire record, therefore, I find that the Respondent's course of conduct between July 28, 1954, and September 2, 1954, previously detailed, whether considered in its totality, or as a series of severable incidents—involved a refusal to bargain in good faith with the Union, as the statutory respresentative of its employees in an appropriate unit, and interfered with, restrained, and coerced these employees in the exercise of rights statutorily guaranteed. And in accordance with the General Counsel's contention, it is further found that the firm's course of conduct converted the strike then current into an unfair labor practices strike, and that it served to extend and prolong the dispute beyond the time within which it might conceivably have been settled if confined to the wage issue only."

The established facts are: the strike against Respondent was part of the industry wide strike (Tr. 117). The

industry wide strike was still current as late as August 26th (Tr. 135). August 31st, 1954, the Governors' Fact Finding Formula was proposed to Respondent as the basis to settle the strike. After the strike started and until August 31st, no request to negotiate was made to Respondent.

It is undisputed that Respondent was operating its sawmill with a full normal crew before August 15, 1954 —more than two weeks prior to the submission of the Governors' formula to it.

By August 15th the positions of all of the strikers had been filled; the strikers had been replaced. Not later than August 15th the strikers had lost all employe relationships with Respondent. Nothing Respondent did extended the strike from July 28th to August 31st, the date of the meeting. At least during that period the strike was continued for the cause that initiated it—the Union wage demand. Anything that happened after August 15th is immaterial.

Assuming an unfair practice was committed at the July 28th meeting, assuming that the letter of August 5th was unfair, the strike until August 31st still was motivated by economic reasons. Before then all positions in Respondent's crew had been filled; all rights of reinstatement had ended. *Black Diamond Steamship Corp. v. N. L. R. B.,* 94 F.(2d) 875 (C.A. 2, 1938); *N. L. R. B. v. Remington Rand, Inc.,* 130 F.(2d) 919 (C.A. 2, 1942); *N. L. R. B. v. Pecheur Lozenge Co.,* 209 F.(2d) 393 (C.A. 2), c.d. 347 U.S. 953. The Union did not rep-

resent the new crew. Any action by Respondent towards the Union, such as a refusal to bargain, was meaningless.

The controlling principles are clearly established. In *N. L. R. B. v. Scott & Scott,* No. 15144, decided by this Court on May 15, 1957, the Court said:

> "In Winter Garden Citrus Products Cooperative v. National Labor Relations Board, 5 Cir., 238 F2d 128, 39 LRRM 2080, upon finding that such causal connection was not shown, the court refused to enforce the order requiring reinstatement. A like result obtains where unfair labor practices are claimed to prolong a strike, and no causal relation between them is shown. National Labor Relations Board v. James Thomson & Co., 2 Cir., 208 F. 2d 743, 749, 33 LRRM 2205; National Labor Relations Board v. Jackson Press, Inc., 7 Cir., 201 F.2d 541, 546, 31 LRRM 2315; National Labor Relations Board v. Crosby Chemicals, Inc., 5 Cir., 188 F. 2d 91, 95, 27 LRRM 2541. No view to the contrary is expressed in National Labor Relations Board v. West Coast Casket Co., 9 Cir., 205 F. 2d 902, 32 LRRM 2353, since that case merely holds that there was substantial evidence to support the finding of the Board that the strike was caused in part by an unfair labor practice.
>
> The expression of the Trial Examiner which was affirmed by the Board, is inconclusive, argumentative and inconsequential. It is based upon a single statement of a highly partisan witness long after the event when everything was suggesting that this foundation be laid."

In addition to the cited cases see *Blackstone Mills, Inc.,* 109 NLRB 772 (1954).

Counsel recognizes the weakness of his position, suggesting that the caused be remanded to the Board to determine which of the strikers had not been replaced (Br. 31, note 17).

Remand is not necessary. The uncontroverted evidence is that all positions had been filled; all strikers were replaced.

The Violation of Section 8(d) of the Act

The Board, after consideration of the Report of the Examiner, rendered a divided Decision. The Majority held that Respondent did not raise the issue of violation of Section 8(d); and, if it did so, it waived the point (Tr. 214-216). The minority held to the contrary—that Section 8(d) was violated with the result the strikers forfeited their status as employes (Tr. 219-225).

The majority of the Board did not disagree with the soundness of the views of the Dissent. The majority impliedly recognized the validity of the Dissent by concluding that Respondent had waived the point.

Such is not the fact. The Act provides (Section 10(e):

> "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

The Dissent of Mr. Rogers expresses more forcefully and clearly than can we the violation of Section 8(d) by the Union.

In finding a waiver the majority said (Tr. 215, 216):

> "Insofar as any 8(d) issue was raised, the Trial Examiner found that it was limited to 8(d)(4) and concluded that under the Board's decision in Lion Oil Company there was not merit in the contention.

> In its exceptions to the Board, the Respondent did not take issue with the Trial Examiner's so limiting the 8(d) issue nor with his failure to consider that 8(d)(1), (2), or (3) were involved in the case. Also, the Trial Examiner stated that the Respondent sought to justify its refusal to bargain because the employees were on strike. The Respondent excepted to this statement. Necessarily, the Respondent thereby completely negated any reliance upon Section 8(d)(4)."

The Trial Examiner in a parenthetical footnote said (Tr. 182):

> "The Respondent's answer also contains a contention, by way of affirmative defense, that the Union's strike action constituted an unfair labor practice—within the meaning of the statute—apart from its character as a contractual breach; the firm argues, apparently, that the Union ought to be held responsible for a refusal to bargain in good faith because it resorted to strike action prior to the expiration date of the agreement with respect to which it desired to negotiate modifications. *See Section 8(d)(4) of the Act, as amended.* It is contended that the strike, therefore, relieved the Respondent of any obligation to deal with the organization. I would find the argument without merit. Lion Oil Company, 109 NLRB 680, 681-686, 34 LRRM 1410, set aside 221 F.2d 231 (C.A. 8), pet. for cert. filed July 15, 1955. (Emphasis added.)

The majority stated that "the Trial Examiner found that it was limited to 8(d) 4 . . . (Tr 215, 216). There is no such finding made by the Trial Examiner. He attempted to state the position of Respondent. He assumed it to be that the Union ought to be held responsible for a failure to bargain. He incorrectly reported Respondent's position and Respondent excepted to that

error. The point to Section 8(d), in this proceeding, is that, by violating it, the strikers forfeited employment rights, with the consequences that flow from such a violation.

Respondent raised the issue at its first opportunity. Its answer charged that the strike was an unfair labor practice. The only unfair labor practice that a Union could commit against Respondent was a violation of Section 8(d). No motion to make more definite and certain or for a bill of particulars was filed by the General Counsel. The issue was raised before the Trial Examiner (Tr. 220); it was raised before the Board by Motion for Reconsideration (Tr. 228-233).

The only unfair labor practice committed by a Union that would be a defense to the charges against Respondent would be a violation of Section 8(d).

The rights enforced by the Board are public rights. The duties to be observed and performed by Respondent are owed to the public—not to a union; not to individuals. The Board is entrusted with the responsibility of seeing that the interest of the public is protected and fostered. *NRLB v. General Motors Corporation,* 116 F.(2d) 306 (C.A. 7, 1940); *NLRB v. Stackpole Carbon Co.,* 128 F.(2d) 188 (C.A. 3, 1942); *Anthony v. NLRB,* 132 F.(2d) 620 (C.A. 9, 1942); *NLRB v. Sunshine Mining Co.,* 125 F.(2d) 757(C.A. 9, 1941); *Commodore Watch Case Co.,* 114 NLRB 1590 (1955).

We submit there was no waiver by Respondent.

These facts also should be considered in passing upon the order directing reinstatement with back pay. An

order of this character is issued again to promote the public welfare. We submit that such an order rewarding those who strike in violation of the Act is an abuse of the power of the Board. *Mackay Radio & Telegraph Co.*, 96 NLRB 106 (1951); *NLRB v. Kingston Cake Co.*, 206 F.(2d) 604 (C.A. 3, 1953).

We subscribe to the position of the Board in the *Mackay Radio* case. Faced with a comparable condition, the Board said:

> "However, we believe that this case stands on a different footing. As already stated, the strike herein not only sought to compel the Respondents to violate the Act, but in itself constituted action which in an appropriate proceeding we would have found to violate Section 8 (b) (2) thereof. Accordingly, the strike in this case not only adversely affected the interests of the Respondents, but from its inception also contravened the public policy, as expressed in the Act of Congress, against conduct by unions and their agents such as is proscribed by Section 8 (b) (2). It is the task of the Board to enforce this public policy; and, even though the Respondents in this case may have condoned conduct violative of such policy, the Board itself, has no license to overlook such conduct. Under Section 10 (c) of the Act, the Board may order reinstatement or back pay for discharged employees only when such an order will effectuate the policies of the Act. We are unable to perceive how it will effectuate the Act's policies to give relief to employees who have engaged in conduct violative of those policies. To do so would place the Board in the position of encouraging through its remedial processes, conduct subversive of the statute. It is rather incumbent upon the Board in a case such as this to discourage such conduct by denying any remedy to employees who have engaged therein. This result, we believe, is in accord with the decision of the Su-

preme Court in the *Southern Steamship* case, which held that an employer might lawfully discharge employees for engaging in a strike which was tantamount to mutiny, and hence a Federal crime, even though the employer had permitted the strikers to work for a time after the strike without raising the issue of its legality.

"In view of the unlawful character of the strike, the Respondents were privileged to solicit the return of the strikers in an effort to terminate the strike and at the end of the strike to discharge, discipline, or reinstate on their own terms employees who participated therein. As it is unnecessary to our decision, we express no opinion as to the legality of the Respondents' actions under other circumstances. We find, accordingly, (a) that the Respondents' solicitation of the strikers in this case did not violate the Act; and (b) that the Respondents' restaffing policy as announced and as applied upon the conclusion of the strike and during the so-called period of "flux," was not unlawful."

The Complaint was dismissed.

THE BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

We do not accept the Statement of Facts by Counsel as an accurate one. Again, since the pertinent facts are stipulated we will not attempt to correct each misstatement, but we will cite a few instances to substantiate this statement.

1. Counsel asserts that the District Council acted as agent for the Union (Br. p. 4). This point we have discussed before. The Council did not act as agent, it acted as principal.

2. Council asserts that on June 28, Howden, business agent of the Union, advised Respondent that he would transmit an offer to the District Council. Howden testified that he was acting for the Council—not the Local Union. He did not offer to submit it to the bargaining agent nor to the District Council. He rejected it. He testified he received no offer.

3. Counsel suggests that before the meeting of July 28, Robertson had called Hughes (Tr. 6). The record does not support that statement.

4. Counsel devotes pages 21-24 to the "straw man" argument that Respondent knew the decertification petition was specious because of the contract bar principle. He, as did the Trial Examiner, ignored the ruling of the Board which did not adopt the contract bar theory.

5. Again, at page 29, Counsel states, "* * * the procedure to handle general wage disputes is outlined in a separate section of the contract, namely Article VIII * * *." Article VIII reads (Tr. 38):

"ARTICLE VIII

"WAGES

> "Wages shall continue subject to the right of either party to request a general wage change by giving the other party written notice of its desire for such general wage change. Negotiations shall commence within fifteen (15) days from the date the notice is received."

The procedure to settle the wage issue is found not in Article VIII but in the no-strike clause, Article IX (Tr. 38).

Most of the argument submitted by Counsel has been answered in the foregoing parts of this Brief. Only a few further comments will be made.

Counsel to support the charge that Respondent went beyond the permissible limits of free speech during the meeting of July 28th cites *N.L.R.B. v. Montgomery Ward & Co.,* 133 F.(2d) 676, and *N.L.R.B. v. Sunshine Mining Co.,* 110 F.(2d) 780, among other decisions. These decisions, insofar as this issue is concerned, were decided long before the adoption of the Labor-Management Act of 1947 which provides:

> "The expressing of any views, arguments or opinion * * * shall not constitute or be evidence of an unfair labor practice * * * if such expression contains no threat or reprisal or force or promise of benefit (Sec. 8(c))."

It is not necessary to reconsider those decisions in the light of Section 8(c) as in each case more was done by those employers than by Respondent.

In the *Montgomery Ward* case, the employer stated that the store would never go Union.

In *Sunshine Mining Co.* not only were the Union representatives threatened, they were driven out of town by a company inspired vigilante group who also intimidated the strikers. There is no hint of such action in this proceeding.

N. L. R. B. v. Wooster Division of Borge Warner, 236 F.(2d) 898, is of interest. The Court does not detail the facts nor explain its reasoning. However, the employer did promise benefits in its appeal to strikers—it

offered free bus transportation to work. This promise alone takes the statements out of the protection of Section 8(c).

Clearfield Cheese Co., 213 F.(2d) 70, is distinguishable upon the same ground. Benefits were definitely offered, threats of reprisal that the Company would move out, were clearly made.

Counsel's authorities are not in point.

When we consider the letter of August 5th (Br. 19, 20), we find it difficult to reconcile decisions. The *Leach* case, 234 F.(2d) 400, is a per curiam opinion. The Court pointed out that the letter was followed by a notice of termination. *Beaver Meadow Creamery, Inc.,* 215 F.(2d) 247, and *U. S. Cold Storage Corp.,* 203 F.(2d) 924, were cited as controlling.

In these cases it was found that the Employer discharged or threatened to discharge the employes because of the strike.

In the *Beaver Meadow Creamery Case,* the Court approved *Kansas Milling Co. v. NLRB,* 185 F.(2d) 413. Examination of that decision will help to understand the views of the Court. In this case, the employer wrote a series of letters to the strikers. The letter of August 15th read in part:

> "We sincerely hope that you will return to your jobs within the time fixed as we would far prefer to work with our old employees and have them receive the benefits now provided for. If you do not return, the company has no other alternative than to hire new employees to take the jobs which you have vacated. We trust this will not be necessary."

A later letter of September 6th advised the strikers that they were no longer covered by group insurance. Then on September 12th, the Company wrote the strikers:

> "Since you have terminated your employment with this company, if you have any clothes or other personal belongings at the plant, we would like for you to call for them by September 16, 1947 * * *."

Referring to these letters, the Court said:

> "Whether the Board's findings of unfair labor practices finds support in the record must be determined from consideration of the Company's letters of August 11, August 15, September 6, and September 12. We see nothing coercive or threatening in the letter of August 11 set out in footnote 5. Summarizing this letter, it was the intent of the company to lay its case before the employees . . . and persuade them to return to work. The letter is mild factual . . .
>
> "The letter of August 15 advised the employees that the Company intended to hire permanent replacements . . . and that if thereafter the strikers sought to return they might be out of a job . . . the company had a right to replace the strikers with other permanent employees and could thereafter refuse to discharge them to make room for the returning strikers. The Company was not obliged to advise the strikers what it proposed to do . . . How can it be said that a warning of what the Company had a right to do, without notice, constituted an unfair labor practice. The concluding sentence . . . does not support a finding that the Company thereby threatened the employees with discharge if they did not return to work by August 23. 'Vacate' is something used in the sense of leaving or going away.
>
> "Neither is the letter of September 6 a violation . . . If their jobs, in fact, had been filled by per-

manent employees, they were no longer employees and would not be covered by the group policy . . .

"Neither does the letter of September 12, 1947, constitute a violation of the Act. True, it assumes that the strikers are no longer employees . . . If all of the jobs had in fact been filled by permanent replacements by that time, the strikers would have terminated their employment with the company and would not be employees."

The letter of Respondent did not go beyond the limits permitted. The Trial Examiner did not find that it did. Respondent did not intend it as a notice of discharge. The strikers did not so consider it.

The decisions cited by Counsel (Br. 30) are not apt. In *Lettie Lee, Inc.*, 140 F.(2d) 243, the strike was caused by the employer's refusal to bargain. He also refused after the strike began. The question of converting an economic strike into an unfair strike was not involved.

In the *Pecheur Lozenge Co.* case the Company refused to bargain unless the strike was abandoned. The causal relationship is clearly established.

In the instant case, Respondent's actions had nothing to do with causing or prolonging the strike. The strike started and continued as an industry strike. When the Governors' proposal was made, it became the Union demand. It did not fit the conditions facing Respondent.

CONCLUSION

The Order of the Board is not supported by the Record nor by controlling legal principles. Enforcement should be denied.

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Attorney for Respondent,
Giustina Bros. Lumber Co.

APPENDIX

The relevant portions of the Labor-Management Relations Act of 1947 are:

Section 8 (c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Section 8 (d). For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: PROVIDED, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no

expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later;

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of Section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under

the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.